Filed 6/9/09 In re K.P. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re K.P. et al., Persons Coming Under the Juvenile Court Law.	B211384
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.A., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK63437)

APPEAL from orders of the Los Angeles County Superior Court. Emily A. Stevens, Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Senior Associate County Counsel, for Respondent.

M.A. filed a petition under Welfare & Institutions Code section 388 seeking to regain custody of two of her four children, or to reinstate family reunification services.[1] The juvenile dependency court denied M.A.'s section 388 petition, following which she filed the appeal that comes before us today. We affirm the dependency court's orders.

FACTS

M.A. and E.P., Sr., are the parents of four children: E.P., Jr., born in August 1991; R.P., born in February 1998; K.P., born in February 2003; and A.P., born in October 2005. M.A.'s present appeal involves K.P. and A.P., her two youngest children.

The family first came to the attention of the Department of Children and Family Services (DCFS) in June 2005, when a case social worker (CSW) arranged for the family to receive Voluntary Family Maintenance services. In February 2006, DCFS received two reports of physical abuse involving E.P., Sr., and E.P., Jr., at which time it began a wider investigation. During the course of that investigation, DCFS "found the [family] home to be in deplorable condition . . . and immediately threatening to the health and/or safety of the children." DCFS also learned that M.A. had been diagnosed with a major depressive disorder with severe psychotic and delusional features, both persecutory and paranoid. For his part, E.P., Sr., admitted drug, alcohol, and anger management problems. DCFS worked with a group of service providers to design and implement a safety plan to prevent the detention of the children. E.P., Sr., agreed to move out of the family home for three to six months, during which he would address his drug and alcohol use, while M.A. agreed to receive mental health services. In March 2006, the CSW received another referral, this time reporting that M.A. "was having delusional behavior." Between March and May 2006, DCFS continued its efforts to provide services for the family, and then "[d]etermined that detention was necessary for the protection and safety of the children."

[1] All section references are to the Welfare & Institutions Code.

On May 23, 2006, DCFS filed a petition on behalf of the children. (§ 300.) The petition alleged that the children were at risk of physical harm, were not being protected, and were being subject to physical abuse. (*Id*., subds. (a), (b) & (j).) The same day, the juvenile dependency court ordered the children detained. E.P., Jr., and R.P. were placed with a relative caretaker in North Hollywood; K.P. and A.P. were placed with a separate relative caretaker in Los Angeles. On June 13, 2006, the court amended the petition by interlineations, and, as amended, found the allegations in the petition to be true. On June 28, 2006, the court approved a disposition case plan which required M.A. to participate in parent education, individual counseling and joint counseling with E.P., Sr., and to follow her medication regimen.

In September 2006, DCFS reported that M.A. and E.P., Sr., were participating in programs under their case plans. On September 28, 2006, the dependency court ordered additional services. In December 2006, DCFS reported that M.A. was continuing to participate in programs under her case plan, but still had problems with hallucinations and paranoia. E.P., Sr., was partially complying with his case plan. On December 6, 2006, the court ordered further services.

In June 2007, DCFS reported that M.A. and E. P., Sr., were living in a motel and "experiencing marital difficulties." The children were receiving appropriate care in their placements with relatives. A.P. was on target developmentally; K.P. had been taken off his seizure medication; R.P. was more verbal; and E.P., Jr., was more willing to express his concerns. M.A. had arrived for visits with the children disheveled and disoriented. E.P., Sr., had acknowledged that he could not provide care for the children, and agreed that the relative caretakers were providing good homes. In August 2007, DCFS reported that a "Dr. Perez" had previously informed the CSW that he would be "adjusting [M.A.'s] medication as he ha[d] observed [her] hallucinations increasing." A counselor had expressed doubts to the CSW about M.A.'s ability to progress in therapy because she had "some serious mental health issues [and] was not always coherent during intake."

In November 2007, DCFS reported that M.A.'s mental health progress had seemed to stagnate, and that she was refusing to take psychotropic medication. E.P., Sr., had been able to obtain stable housing and employment, and had expressed a desire to reunify with his two oldest children, E.P., Jr., and R.P., but recognized that he did not share a strong bond with K.P. and A.P., his two youngest children, who were continuing to do well in their relative placements. On November 27, 2007, the dependency court ordered all four children to remain dependent children of the court, extended reunification services for K.P. and A.P., and ordered E.P., Jr., and R.P. to be placed "in the home of parents under supervision of DCFS."

In February 2008, DCFS reported that M.A. and E.P., Sr., "continued[d] to have a lot of difficulty in their relationship," and were not in compliance with their court ordered case plans because they had failed to attend counseling during January. The CSW had observed that M.A.'s behavior during visits with K.P. and A.P. showed an inability to provide adequate direction and supervision. DCFS recommended termination of family reunification services, "in pursuit of adoption [by K.P's and A.P.'s] caregiver." On February 21, 2008, the dependency court terminated family reunification services, and set a permanent plan hearing as to K.P. and A.P. for April; the court later continued the permanent plan hearing to August 2008.

In August 2008, DCFS reported that K.P. (then five years old) and A.P (then two) both appeared "mentally and emotionally healthy," and that their relative caretakers had stated an interest in adopting the children, and had cooperated in completing the paperwork for an adoptive home study. The relative caretakers had "consistently" provided care for both children since the time of their initial placement, and had demonstrated that they had the capacity to meet the children's needs. K.P. exhibited age appropriate development both physically and socially, and was attending preschool. His teacher had reported that he was doing well, and that she had "no concerns" at that time. A.P. was a client of the South Central Regional Central, with a diagnosis of development delays, but was standing and walking on his own and showing an increased ability to verbalize. M.A. and E.P., Sr., continued to visit their two youngest children

"sporadically." DCFS had concluded that the "the most stable home for the children [was] in the home of their relative [caretakers]," and recommended termination of parental rights. On August 7, 2008, the dependency court continued the section 366.26 hearing to September 25, 2008.

On August 29, 2008, M.A. filed a section 388 petition alleging that she had made "significant progress in both her individual therapy and domestic violence counseling," and, on that basis, requesting new dependency court orders, specifically a new "home of parents" placement, or, in the alternative, reinstatement of family reunification services. M.A. supported her petition with a letter from Hebe Beatriz Lein, Ph.D., M.A.'s therapist since October 2007, documenting M.A.'s attendance at 20 therapy sessions. According to Dr. Lein, M.A.'s "mood ha[d] become more stable," and she had not been showing, "flat or depressed affect [or] any psychotic features." M.A. had told Dr. Lein that she (i.e., M.A.) was "getting along" with E.P., Sr., and that he was being more attentive to the children's needs. A group facilitator at California Hospital Medical Center supplied a second letter which stated that M.A. had been a member of its domestic-violence support group for two years. Her attendance was almost perfect, and she openly participated. On September 9, 2008, the dependency court set M.A.'s petition for a hearing in conjunction the then-pending section 366.26 hearing.

In September 2008, DCFS reported that M.A. and E.P., Sr., had attended three joint marriage counseling sessions since the last court date, but the therapist had observed that they continued to have "issues related to poor communication." E.P., Sr., had expressed a desire to separate from M.A. because she would not share her Social Security income. M.A. remained unwilling to change and did not trust E.P., Sr., due to his history of abuse. According to K.P.'s and A.P.'s relative caretaker, both parents' recent visits had become sporadic and inconsistent; E.P., Sr., only wanted to visit with K.P.; neither parent visited either child in September 2008. The CSW noted a continuing strong sibling relationship between the four children, but E.P., Jr., wanted K.P. and A.P. to remain with their relative caretaker because he "knows that [M.A. and E.P., Sr.] cannot care for [their two youngest children] because they are always too busy arguing," and he

(i.e., E.P., Jr.) did not believe that he would be able to fill in the care gap for his brothers. K.P.'s and A.P.'s relative caretaker had indicated that sibling visits would continue to be permitted if she adopted the younger boys.

DCFS's report addressed Dr. Lein's letter by noting that it was largely based on information provided by M.A., and portrayed a very different view of the family from that observed by DCFS's case workers. DCFS disagreed, based on the observations of its own personnel, that M.A. had demonstrated the ability to care for her younger children. The social worker observed several visits between M.A. and her children, and personally observed M.A. become easily distracted during visits. Further, E.P., Jr., had reported that M.A. did not like to watch the younger children during the visits, and would have him supervise them. E.P., Sr., had also confirmed M.A.'s lack of supervision with the younger boys. DCFS recommended denying M.A.'s section 388 petition, and further reported that the adoptive home study for K.P.'s and A.P.'s caretakers had been approved.

At the conclusion of the hearing on September 25, 2008, the dependency court denied M.A.'s section 388 petition, and terminated M.A.'s and E.P., Sr.'s parental rights over K.P. and A.P.

M.A. filed a notice of appeal from the dependency court's September 2008 orders.

DISCUSSION

M.A. contends the dependency court's decision to deny her section 388 petition must be reversed because (1) the court "did not recognize that maintaining [K.P.'s and A.P.'s] relationship with their [older] siblings was in [K.P.'s and A.P.]'s best interests," and because (2) the court "placed undue emphasis on their bond with their caretakers." We disagree.

Two fundamental questions are presented by a parent's section 388 petition: (1) is there new evidence showing a change of circumstances supporting a modification of the dependency court's previous orders, and (2) is a modification of the court's prior orders in the "best interests of the child"? (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) There are no standardized answers in the context of section 388 petitions; each such petition

must be decided based on the particular needs and circumstances of the particular child affected by the particular petition placed at issue before the dependency court. (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 530.) For this reason, a dependency court's decision to grant or deny a section 388 petition is committed to the court's discretion, and is reviewed on appeal under the abuse of discretion standard. (*In re Stephanie M*. (1994) 7 Cal.4th 295, 317-318.) Under this standard, we will not reverse the dependency court's decision on M.A.'s section 388 petition unless she convinces us that the court's ruling was arbitrary, capricious or patently absurd. (*Id.* at p. 318.)

M.A. is correct that the evidence shows that K.P. and A.P. were largely raised by their older siblings, E.P., Jr., and R.P., until DCFS intervened in the family dynamics, and that all four siblings have maintained and enjoyed regular contact throughout the course of the dependency proceedings. M.A. is also correct that E.P., Jr., and R.P. have stated and shown their love for K.P. and A.P., and that K.P. and A.P. have shown a bond with E.P., Jr., and R.P. Given this record, we agree in the abstract with M.A.'s assertion that "[a]ll of this evidence supported a finding that granting [her] section 388 petition was in [K.P.]'s and [A.P.]'s best interests." In other words, we agree with M.A.'s implicitly floated idea that, had the dependency court granted her section 388 petition, its decision would be supported by substantial evidence.

Our task on appeal, however, is not to determine whether the evidence supports a decision that the dependency court reasonably *could have* made, but rather, whether the evidence supports the decision that the court *actually made*. In other words, our task is to examine the record, and to determine whether substantial evidence supports the court's conclusion that granting M.A.'s section 388 petition was not in K.P.'s and A.P.'s best interests. Having undertaken an examination of the record, we now find the dependency court's conclusion is supported by substantial evidence, and is not arbitrary, capricious or patently absurd.

Although the evidence in the record shows that M.A. has made some progress in addressing her problems which led to the intervention of the dependency system initially, the record does not show, as a matter of law, that it is in K.P.'s and A.P.'s best interests to be returned to the family home. Refuting such a conclusion is evidence showing that, after E.P., Jr., and R.P. returned to the family home in November 2007, M.A.'s ability to provide care caused E.P., Sr., sufficient concern to forego work and to stay in the home. E.P., Jr., and R.P. also reported that their parents continued to fight in their presence, and that M.A. sometimes appeared disoriented. The youngest children's relative caretaker and the CSW had both observed that M.A. had difficulties in supervising K.P. and A.P. during visits, and, by the time of the combined hearing on M.A.'s section 388 petition and the section 366.26 issues, M.A.'s visits were limited and inconsistent. Finally, and perhaps most significantly, E.P., Jr., himself had told the CSW that he had concerns about K.P. and A.P. returning home because he feared M.A. would not be able to care for the younger children.

We are satisfied that the dependency court did not act irrationally when it found that any changes in circumstances in the current case did not — in K.P.'s and A.P.'s best interests — justify a modification of its previous orders. In finding no irrationality in the court's decision, we reject M.A.'s contention that the court "did not recognize" the good to be derived from continuing the sibling relationship enjoyed by E.P., Jr., R.P., K.P., and A.P. The record does not affirmatively show that the dependency court did not consider the issue of sibling bonds in deciding to deny M.A.'s section 388 petition, and we decline to infer from the record that the court failed in any manner to make a reasoned decision, taking all relevant factors into consideration.

Moreover, the record does not, in our view, support M.A.'s suggestion that the dependency court's decision to deny her section 388 petition is necessarily going to harm the sibling relationship between E.P., Jr., R.P., K.P., and A.P. The younger children are placed with a relative caretaker, and we see nothing in the record to suggest that the caretaker is intent on denying them the benefit of their sibling relationships. On the contrary,

the record shows that the relative caretaker has expressly stated that the children will be permitted to continue having visits with each other.

DISPOSITION

The juvenile dependency court's orders are affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.